Supreme Court, U.S.
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No. 93-1870

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

RAYMOND B. BENZINGER,
AIDANT, INC.,
ALLEN A. IZADPANAH, and
WALTER T. CHARLTON,

Petitioners,

v.

SIREX, USA, INC., et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT FOR FAIRFAX COUNTY, VIRGINIA

BRIEF FOR RESPONDENT

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45 pp

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QUESTION PRESENTED

Does a trial court have discretion to award monetary sanctions against an attorney who files subpoenas for an improper purpose in violation of Code of Virginia 8.01-271.1, and Virginia Supreme Court Rule of Civil Procedure 1.4?

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VIRGINIA CODE

Article 2

Pleadings Generally

§8.01-271.1. Signing of pleadings, motions, and other papers; oral motions; sanctions. - Every pleading, written motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, and the attorney's address shall be stated on the first pleading filed by that attorney in the action. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address.

The signature of an attorney or party constitutes a certificate by him that (i) he had read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper

purposes, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, written motion, or other paper is not signed, it shall be stricken unless it is signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.

An oral motion made by an attorney or party in any court of the Commonwealth constitutes a representation by him that (i) to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and (ii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

If a pleading, motion, or other paper is signed or made in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed the paper or made the motion, a represented party, or both, an

appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper or making of the motion, including a reasonable attorney's fee. (1987, cc. 259, 682)

STATEMENT OF THE CASE

A. INTRODUCTION

The only issue properly appealed to this Court is the sanctioning of Petitioner's attorney Raymond Benzinger (hereafter "Benzinger"). Fairfax County Circuit Court Judge Bruce Bach sanctioned Benzinger after concluding that he violated Va. Code 8.01-271.1 Ann. (1985) by issuing subpoenas to Appellees for an improper purpose.

Rather than address this issue head-on, Petitioners would like this Court to review the entire underlying case, overturn Orders which have been final for years, and thereafter vacate Benzinger's sanctions. To disguise improper collateral attacks on final Orders, Appellants present a selective, incomplete case history. However, none of these underlying judgements are here for review.

B. HISTORY OF THE CASE

On May 3, 1991 Raymond Benzinger signed a Consent Order agreeing that a judgment should be entered against his client Allen Izadpanah (hereafter "Izadpanah") in favor of

Sirex U.S.A., Inc. (hereafter "Sirex") in the amount of $ 21,997.05. This Consent Order was never appealed, and is final. (The final 1991 Consent Order is attached to the Petition For Writ Of Certiorari at pp. a10-a11, and will be referred to herein as "the Sirex judgement"). Over the next several months attempts to collect on the Sirex judgement were unsuccessful. Collection related queries directed to Benzinger led to his hasty, albeit temporary, withdrawal from this case.

Thereafter, collection efforts stalled because Izadpanah fled his creditors in the Commonwealth of Virginia, leaving the Country for Riyadh, Saudi Arabia.

In July, 1991 Federal Computer Corporation ("FCC") offered to purchase the Sirex judgement, hoping a money judgement against Izadpanah could be helpful in fending off his continuing stream of litigation. [1]

---

[1] From 1989 to the present Izadpanah has repeatedly sued FCC, and/or its founder and president Robert Hummel. Izadpanah has never prevailed on a single substantive issue, and all of his cases have now been dismissed. In fact, the Fairfax Circuit finally issued an order that no new lawsuits

On July 29, 1991, pursuant to Virginia law, FCC purchased the Sirex judgement through an "Assignment of Judgement" accompanied by a "Power of Attorney" from Sirex, authorizing FCC and attorney Edward Gross to lawfully pursue collection of the judgement. (These purchase documents are part of the record in this case, and are attached to the Petition For Writ Of Certiorari at pp. e13-e16).

However, the elusive Izadpanah proved to be "collection proof." He was "persuaded" to appear for court ordered Debtor's Interrogatories only after a Capias Warrant was issued for his arrest (Appendix, a3). Although Izadpanah frequently travels abroad, he testified under oath that:

1. His employer pays him no salary;

2. His tailored clothes, travel expenses, and living accommodations are paid directly by his employer, so he doesn't need money for these things;

---

could be filed without leave of court.

3. Gucci loafers and other items are 'given' to him by Saudi street vendors, because "if you need anything in Saudi Arabia, they just give it to you;" and

4. The only money he has in the world is the ninety-nine cents he carried to the Debtor's Interrogatory hearing in his pocket.

Izadpanah's one admitted asset was capital stock of Aidant, Inc., a closely held, private Virginia corporation which he, FCC, Charles Crowe, and another investor jointly owned. In accordance with Virginia law, Judge Bruce Bach of the Fairfax County Circuit Court ordered Izadpanah's stock sold, and the proceeds applied to his debt. (The August 31, 1991 Order directing this stock sale is attached to the Petition for Writ of Certiorari at pp. a8-a9, and will be referred to hereafter as "the Stock Turnover Order"). This Stock Turnover Order was never appealed and is final. In accordance with the Stock Turnover Order, Izadpanah's stock in Aidant, Inc. was sold after notice of the sale was given to all interested parties, including Izadpanah. The stock was

purchased by the only interested buyers -- the co-owners of this closely held, private corporation. The stock was returned to the corporate treasury for cancellation.

Izadpanah made no offer for the stock, and made no effort to pay his indebtedness on the underlying judgement. Instead, his attorneys awaited the outcome of the stock sale, then sought to collaterally attack the Stock Turnover Order, and the sale of the stock. The same unsupported arguments which appear in the present Petition for Writ of Certiorari were presented to the trial court at a 1991 hearing on Appellant's Motion To Vacate the Stock Turnover Order. This matter was fully litigated in 1991, and the Fairfax County Circuit Court rejected challenges to: 1) jurisdiction of the court, 2) the validity of the Stock Turnover Order and the Sirex judgement, 3) the adequacy of service of process and notice given to Izadpanah of the stock sale, 4) the method, manner, timing and outcome of the stock sale, and 5) denial of the right to "due process." After hearing all their

"evidence," Judge Bach rejected Appellant's challenges, and stated in his November 1, 1991 Final Order:

> " . . . after hearing argument by both Counsel for Defendant and Counsel for Plaintiff, this Court determines that the Order to Turnover Property entered on August 29, 1991 by this Court was proper; and that the sale of the Aidant, Inc. stock by Edward Gross on October 4, 1991 was proper and valid; therefore it is
>
> ORDERED that the Motion to Vacate described above is denied."
>
> (Appendix, a1)

Izadpanah and his attorneys do not even mention this November 1, 1991 Final Order in their Petition to this Court. This Final Order is critical to the disposition of this case, because Izadpanah appealed that Order to the Virginia Supreme Court in 1991, and his Petition For Appeal was denied in early 1992. If he wished to appeal any of those issues to this Court, including the due process challenges he now forwards, he was required by this Court's rules of procedure to pursue these matters in 1992. Having failed to do so, he now attempts to "bootstrap" challenges to these final orders through his attack on the sanctions Order. The stock

transfer matters have been litigated fully, and should be final for all purposes. The complete omission on any reference to this November 1991 Final Order from Izadpanah's Petition is a material, misleading omission, which presents an incomplete, inaccurate depiction of the case below, and provides yet another example of the sort of abuse of process for which sanctions have been issued.

C. SANCTIONED CONDUCT

In disregard of the principle of finality of judgements, Benzinger and Charlton attempted in late 1992 to reopen litigation by challenging the Stock Turnover Order and the Final Order. During post-judgement collection proceedings they served subpoenas duces tecum upon: 1) Izadpanah's judgement creditor, 2) the creditor's attorney (seeking privileged and confidential documents), and 3) individuals and entities not party to the case.

The manner, timing and scope of this discovery was highly questionable. The subpoenas were served on a Friday, demanding return and extensive document production the next

business day (which was a Tuesday because the intervening Monday was a holiday, and the Court was closed).

The procedure invoked was improper under the Virginia Supreme Court Rules of Procedure, (which provide 21 days to respond to any request for documents). See, e.g., Virginia Supreme Court Rules 4.5(b)(5) and 4.9. Even a cursory review of the documents requested reveals the over-broad, burdensome nature of this discovery.

Upon receipt of these subpoenas, Respondents' counsel immediately contacted Benzinger and requested a short extension in the return date. Benzinger summarily refused this request, demanded immediate compliance, and threatened to invoke the Court's contempt power against those not appearing and producing materials on the prescribed day (Appendix, a7).

Commissioner Charles Dunn, whose name Benzinger attached to the subpoenas, was more than a little surprised, and refused to issue the subpoenas, stating in relevant part:

> " I suppose the Clerk may issue the subpoenas but please note that I did not reserve a time on

> my calendar for [the hearing noticed by the debtor]. . . . I would also provide enough time for the other side to be heard before a Circuit Court Judge since I think, at first, it is unusual or novel to issue a subpoena duces tecum for a judgement debtor to have documents produced at a Commissioner's hearing. . . .
>
> Hence, I decline to issue the subpoenas. . ."
>
> (Appendix, a5)

Undeterred by the Commissioner's letter, Benzinger demanded appearance and document production at the Office of the Fairfax County Circuit Court Clerk. At the emergency hearing necessitated by this conduct, Judge Lee ordered a stay of the subpoena return date to allow objections. Judge Lee stated:

> "The ruling of the Court is that the subpoenas which were issued to Mr. Edward Gross, directing him to appear before Judge Bach on October 16, will be quashed...
>
> At best the procedure is irregular, even looking at 8.01-506.1 of the Code."

Hearings on the propriety of the subpoenas covered portions of five separate days, including a full day on March 30, 1993. Judge Bach heard Benzinger's evidence and

argument attempting to justify his conduct over five days, then sanctioned Benzinger, stating:

> "And in my opinion it was done in a way to bring about maximum disruption to and trouble to the other side. . .
>
> [I]n addition to everything else, to me and at least as important as filing these subpoenas, was what was asked for, and the way it was asked, and the timing of it.
>
> It was as I said in the other hearing extreme hardball, and I think that is sanctionable. . ."

(Appendix, a12-a13).

SUMMARY OF ARGUMENT

In 1991 Izadpanah lost all of his stock in Aidant, Inc., and therefore had no standing to initiate his various stockholder's derivative actions.

In 1992 Izadpanah unsuccessfully appealed the seizure and sale of his stock to the Virginia Supreme Court. No further appeal was attempted, and therefore Izadpanah's loss of stock has been a final, decided matter since 1992.

Rather than accept the finality of this stock loss, Izadpanah and his attorneys have repeatedly attempted to reopen that matter, and somehow regain standing to file stockholder derivative suits. This unreasonable refusal to accept finality of judgments manifested itself in improper use of court process, and resulted in sanctions being imposed against attorney Benzinger.

Unable to directly contest the loss of stock, Petitioners have manufactured a massive conspiracy that includes opposing counsel, and even the Virginia judiciary. Petitioners argue that this conspiracy resulted in "fraudulent" judgments;

hence, their challenge to the stock seizure and sale should be deemed timely and heard by this Court.

There is no credible evidence to support any aspect of this far-fetched conspiracy theory. Petitioners' derivative actions were properly dismissed, because Izadpanah has no stock, and his attorneys were properly sanctioned for their unreasonable refusal to accept this fact.

ARGUMENT

A. INTRODUCTION

Despite their unsuccessful challenges and appeals over two years, Izadpanah's attorneys refuse to stop litigating decided matters. They are here attempting to overturn the Stock Turnover Order and the Final Order, and asking this Court to revisit the underlying Sirex judgement as well. However, these matters are final, Izadpanah's loss of stock has not, and could not properly be, designated as an assignment of error in this appeal; therefore, their entire line of argument is improper.

This appeal presents yet another futile attempt to re-litigate decided matters. This unreasonable pattern of refusal to accept the validity and finality of Court Orders manifested itself in improper conduct once too often, and resulted in sanctions being imposed.

B. THE COURT ISSUED SANCTIONS FOR IMPROPER CONDUCT

Judge Bach gave Petitioners' hearings over five days to defend their conduct and present evidence.

At the conclusion of these hearings, Judge Bach issued sanctions because of the manner in which Benzinger conducted himself. Petitioners argue to this Court that Benzinger had "reason to believe" he could issue the offending subpoenas. These arguments simply ignore the point of the sanctions; these attorneys were found to have used the Court's procedures for an improper purpose. That is Judge Bach's precise finding, and he left no room for post-hoc rationalizations. Judge Bach's precise holding states:

> "[I]n addition to everything else, to me and at least as important as filing these subpoenas, was what was asked for, and the way it was asked, and the timing of it."
>
> (Appendix, a12-13).

When attorney Benzinger refused Respondents' request for a short extension to object to his unprecedented and burdensome subpoenas, any question of propriety was resolved against him. Commissioner Dunn made perfectly clear to Benzinger that, at the very least, his "novel" request must be tempered with time for response. Benzinger refused.

He either knew or suspected that his subpoenas would be quashed, and therefore sought to maximize disruption to Respondents and their attorneys, using an improperly short return period to achieve these ends. As Judge Bach said:

> "[I]n my opinion it was done in a way to bring about maximum disruption to and trouble to the other side."
>
> (Appendix, a12-a13).

C. PETITIONERS' CONTRADICTORY EXCUSES CANNOT JUSTIFY THEIR CONDUCT

There can be no clearer example of filing a paper for an improper purpose than the acts of Benzinger in this case -- a post-judgement debtor attempting to harass and intimidate a creditor by initiating discovery over final matters. More egregious still was the manner in which this activity was conducted.

Petitioners attempted to justify their conduct in their Virginia Supreme Court Brief by alleging that attorney Charlton believed the underlying Sirex judgement had been

somehow "paid in full," despite the undisputed fact that his client has never paid a single penny toward the debt.

At trial below, however, Petitioners offered a quite different excuse for their conduct. Then, Petitioners vigorously argued that: the judgement creditor refused to provide an accounting of the judgment balance,and a debtor is always entitled to an accounting of the judgement balance upon demand; therefore, the debtor's counsel was justified in seeking records to determine the balance. (How this might justify an onslaught of subpoenas, a one business day return period, and contempt threats for failure to comply, was never explained).

Under cross-examination, however, an associate of Benzinger and Charlton's law firm, Mary Jolma, admitted that Sirex Counsel had been given a full written accounting of the judgement balance, and that she personally observed this written accounting in the firm's files (Appendix, a11). That cross-examination admission, and the written accounting of the judgement balance which was accepted as evidence in the

record, completely impeach the Petitioner's prior rationale for the sanctioned conduct.

Having been impeached by their own associate, Petitioners' now omit the 'accounting' argument, and instead blindly allege that somehow, without their debtor client ever volunteering a penny, the underlying judgement has been fully paid. In light of the undisputed facts, this unsupported claim that there is "reason to believe" Izadpanah's debt has been paid in full is utterly specious.

In fact, the Petitioners' evidence at trial below included an Affidavit by Sirex U.S.A.'s President Eddie Chu (Appendix, a9). Mr. Chu's Affidavit contradicts each of the essential propositions forwarded by the Petitioners. That Affidavit unequivocally states in relevant part that:

> " . . .
> 5. The balance of the [Sirex] judgement was subsequently assigned to Federal Computer Corporation for additional compensation on July 29, 1991. (The Affidavit then referenced the 'Assignment of Judgement' and 'Power of Attorney' to FCC, which had been made attachments to Mr. Chu's Affidavit).

> 6. At the time of the assignment less than the full judgement had been paid.
>
> 7. The original [Sirex] action was maintained by local council [sic] Ed Gross on behalf of Sirex. (Emphasis added).
>
> . . ."

Judge Bach heard all of the Petitioners' "evidence" and argument time and again over two years. He was never persuaded. This Court should not revisit these final, factual determinations.

D. SANCTIONS WERE REASONABLE IN NATURE AND AMOUNT

If Virginia Code Ann. §8.01-271.1 is to have any meaning, it is that a judge who finds improper conduct can act to control and redress that conduct. Judge Bach heard evidence over five separate days, and in the end he concluded that improper, "hardball" tactics had been employed for an improper purpose. He therefore quashed improper subpoenas, and issued monetary sanctions designed to redress the improper conduct. These monetary sanctions represented

some, but not all, of the costs of responding to the improper subpoenas, and seeking sanctions. As Judge Bach stated:

> "I think that this statute contemplates reasonable fees to bring this motion, and we have been here a number of days on it, and we are here again today, all day today in court, and I think that is a reasonable fee."
>
> (Appendix, a12).

Judge Bach's reasoning was:

> "[W]ho would ever bring a $250, or $300, or $1,000 sanction if the other side could cost their client ten times that amount, or five times that amount, or even that amount again in additional attorneys fees in order to bring it."
>
> (Appendix, a12).

It is important to recognize that the fees associated with seeking sanctions escalated because Petitioners repeatedly requested additional argument, ultimately encompassing five separate days worth of hearings, including the full day March 30, 1993 hearing. If excessive time was expended, it was expended at Petitioners' specific request, and the associated costs should be borne by them.

E. NO GROUNDS THAT WARRANT CERTIORARI

Rule 10 of the United States Supreme Court Rules sets out the general basis upon which this Court will grant Petitions for a Writ of Certiorari. The Petition filed in this matter presents no "special and important reasons" for this court to review the sanctions order imposed on Benzinger. There are no important Federal Questions to be resolved. Sanctions regarding abuse of Virginia Rules of Procedure pose no such issue. The "Federal Question" raised by the Petition involves "due process" claims over seizure of property which occurred in 1991, and was litigated through the Virginia Supreme Court, but was never appealed to this Court.

The Petition presents no arguments regarding a conflict between various United States Court of Appeals or conflicts between the decisions of State Courts of last resort.

If this Court chose to grant Certiorari in this case, it would essentially be determining whether an attorney could be sanctioned for improper conduct during his defense of a collection action.

F. UNPRINCIPLED CONDUCT OF BENZINGER AND CHARLTON

Benzinger and Charlton in their Petition again repeat untrue accusations against Edward Gross, who is a member in good standing of the Bar of the Commonwealth of Virginia, the State of Maryland and the District of Columbia, the Federal Courts in these jurisdictions, and this Court. Every judge that has heard these accusations has rejected them.

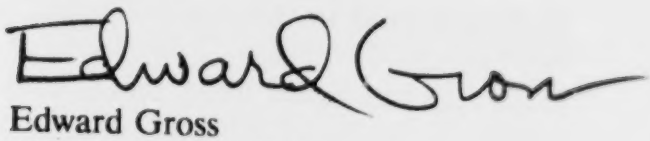
Now, in this Petition, the Petitioners expand their accusations to include the entire judicial system of the Commonwealth of Virginia. According to the Petition, the Virginia judiciary itself has participated in the perpetration of a "fraudulent collection action" against Petitioners and their client. If this Court chooses to hear this action, it will only encourage Benzinger and Charlton to continue their improper behavior.

CONCLUSION

If a judge is to have control of his case-load, courtroom, and docket, then he must have discretion to award sanctions for improper conduct. Judge Bach's sanctions were reasonable

and well reasoned, and should not be overturned. This Petition For Writ of Certiorari should be denied.

Respectfully Submitted,



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Counsel for Respondent Sirex, USA, Inc.

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V I R G I N I A:
IN THE CIRCUIT COURT OF FAIRFAX COUNTY

SIREX U.S.A., INC.	)	
	)	
Plaintiff,	)	
	)	
vs.	)	AT LAW NO: 93228
	)	
AIDANT, INC. et al.	)	
	)	
Defendants.	)	

FINAL ORDER

THIS MATTER came before this Court on October 18, 1991, based upon Defendant's Motion to Vacate the Order of August 29, 1991, to Set Aside as Void, the Purported Sale of Aidant, Inc. Stock Owned by Allen A. Izadpanah, and for Further Injunctive Relief Pending Determination of an Appeal Before the Supreme Court of Virginia; and after hearing argument by both counsel for Defendant and Counsel for Plaintiff, this Court determines that the Order to Turnover Property entered on August 29, 1992, by this Court was proper; and that the sale of the Aidant, Inc. stock by Edward Gross on October 4, 1991, was proper and valid; therefore it is

ORDERED that the Motion to Vacate described above is denied.

_____ _____
Date Judge, Fairfax Circuit Court

I ASK FOR THIS:

Edward Gross
Counsel for Plaintiff

SEEN AND OBJECTED:

Raymond B. Benzinger
Counsel for Defendant
Allen A. Izadpanah

V I R G I N I A:
IN THE CIRCUIT COURT OF FAIRFAX COUNTY

SIREX U.S.A, INC.	)	
	)	
Plaintiff,	)	
	)	
vs.	)	AT LAW NO: 93228
	)	
ALLEN IZADPANAH	)	
	)	
Defendant.	)	

C A P I A S

COMMONWEALTH OF VIRGINIA

County of Fairfax, to-wit:

TO: Wayne Huggins, Sheriff
Fairfax County, VA
4110 Chain Bridge Road
Fairfax, Virginia 22040

G R E E T I N G S:

TO ANY AUTHORIZED OFFICER: You are hereby commanded in the name of the Commonwealth forthwith to arrest Allen Izadpanah, Defendant, c/o Raymond Benzinger, 2009 N. 14th Street, Suite 410, Arlington, Virginia 22201, and to produce the Defendant in the Court when found, or as soon thereafter as this Court may be in session, to show cause, if any, why Defendant should not be imprisoned, fined or otherwise punished for contempt for failure to appear before Commission Charles Dunn on March 9, 1992, at 2:30 P.M. to answer Debtor's Interrogatories.

Defendant, Allen Izadpanah, shall be held until he is to appear before Commissioner Dunn at 3925 University Drive, Fairfax, Virginia 22030 on May 12, 1992, at 3:00 P.M.

The following circumstances should be considered by the Judicial Officer determining bail: Defendant regularly leaves this jurisdiction to go to Saudi Arabia.

Given under my hand as Commissioner in Chancery of the Fairfax County Circuit Court, this _____ day of _____ 1992.

_____
Charles Dunn
Commissioner in Chancery

VIA FAX AND US MAIL

Raymond B. Benzinger, Esq.
Attorney at Law
2009 North 14th Street, #410
Arlington, VA 22201

RE: Sirex v. Aidant - Law No. 93228

Dear Mr. Benzinger:

I received your letter of October 6, 1992 (which was postmarked 10/8/92) today along with copies of four Requests for Subpoena Duces Tecum returnable to my office at 1:00 p.m. on October 13, 1992.

I suppose the Clerk may issue the subpoenas but please note that I did not reserve a time on my calendar for 1:00 p.m. on October 13, 1992. If the requests are directed to me to issue the subpoenas, I would want to take testimony or have an affidavit that is persuasive to me on how and why a judgment debtor should have certain documents subpoenaed; I would also provide enough time for the other side to be heard before a Circuit Court Judge since I think, at first, it is unusual or novel to issue a subpoena duces tecum of a judgment debtor to have documents produced at a Commissioner's Hearing. I do suppose there are certain cases

and reasons for it but, again, I would need some persuasive evidence therefor.

Hence, I decline to issue the subpoenas and, if already issued by the clerk, you will need to postpone the hearing date and time and, if you would, in order to promote judicial economy, have the documents returnable to the Clerk's Office. That way, the other side will have the time to take it up with a Circuit Court Judge if they are so advised and Commissioners' fees won't be incurred with the attendant question of who is responsible for
the Commissioner's fees.

Perhaps Judge Bach can rule on this matter on October 16, 1992.

Very truly yours,

Charles C. Dunn

Q. Okay. Were you aware then of the timing of the issuance of the subpoenas, or the service of the subpoenas, and that it was going to happen essentially days before an extended weekend, and days before the return of those subpoenas were required?

A. No, I don't think that was -- I think that was just unflutitious maybe. It was not the kind of thing where we held up the subpoena so that it would hit at a bad time. In fact, half the time we don't even know it is a long weekend, because we work them any way. those things sometimes just pass us by.

My recollection was that when I came up with idea that it was a let's do it, and let's do it ASAP type of thing, and without regard for -- you know, it is a long weekend, and let's wait until the last second.

Q. And was there any regard placed to the attorney, or in other words, myself,

on whom these subpoenas were going to be served?

A. My recollection, Mr. Gross, is that there was already a hearing scheduled, and I don't know why I think that. Maybe you can refresh my recollection on that, but my recollection was that there was already a hearing scheduled either before Mr. Dunn, or before Judge Bach, or something like that, and it was very, very close to --

Q. I will refresh your recollection. There were no hearings during the same time period that you are talking about.

A. Well, my recollection is that there was, and I don't know why I think that. It is just something in my head.

Q. So, was there a discussion about -- in the nature of, hey, we can serve these at a certain time and that are going to cause maximum problems to Mr. Gross?

A. Oh, no, Mr. Gross. This was a

question of that we needed to get this thing resolved, and we needed to do it now. there are some serious problems here, and I don't really want to say this, but I will be honest with the court.

We were quite frankly concerned that too much lead time would afford an opportunity to -- for mischief. let me say that in that way.

* * *

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A Professional Corporation
Suite 410
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Arlington, Virginia 22201

Raymond B. Benzinger (703) 525-1362
Mary M. Jolma FAX (703) 525-2930

October 13, 1992

Via Facsimile and Mail

Commissioner Charles C. Dunn
Dunn, McCormack, McPherson & Maxfield
3925 University Drive
Fairfax, VA 22030

Dear Commissioner Dunn:

Apparently our letter of October 6, 1992 with attached subpoenas was not as self explanatory as I had hoped. To the extent my previous letter resulted in a miscommunication with the Commissioner, I regretfully apologize and submit the following clarification.

(1) The subpoenas requested were in fact issued by the clerk of the court.

(2) Those subpoenas were in fact served upon Messrs. Gross and Crowe.

(3) No hearing was contemplated or noticed by us. Nor was it contemplated

that the Commissioner needed to be present for the delivery the material subpoenaed. We merely followed the applicable statute which contemplates return of the documents subpoenaed to the Commissioner's office. Hearing was, however, scheduled on a motion before Judge Bach on October 16, 1992. We now learn that Judge Bach will not be available on that date.

(4) The statute referenced allows "any party" to obtain the documents which we subpoenaed.

(5) If there is any charge for receipt of the documents at the office of the Commissioner, we will assume responsibility for paying all appropriate charges.

(6) While we have received Motion(s) to Quash the subpoenas as to both Mr. Gross and Mr. Crowe, neither of those motions has been set for a hearing.

(7) We expect that the subpoenas will

be adhered to as a valid order of the court. We intend to move for a Rule to Show Cause if they are not honored.

(8) We understand that Judge Bach will not be available until next Tuesday. We therefore suggest to counsel of record, in the event the subpoenas are not honored, a hearing on the next regular motions day, October 23, 1992, to resolve all of these issues. We shall file notices this week as appropriate. If counsel have any objections to this date, we would expect to be notified immediately.

(9) We would respectfully request that opposing counsel agree to the hearing date of October 23, 1992 instead of October 16, 1992. We further request that both Mr. Crowe and Mr. Gross agree to be present on October 23, 1992 in lieu of the subpoena date (10/16/92) for that hearing on the opposing motion.

Again, Commissioner Dunn, I apologize

for any misunderstanding that may have occurred. I was merely following what I thought was permitted by the statute.

Respectfully submitted,

/S/

Raymond B. Benzinger

RBB:md

cc: James Kurz, Esquire
Edward Gross, Esquire

Law Office of
Raymond B. Benzinger, P.G.
A Professional Corporation
Suite 410
2009 North 14th Street
Arlington, Virginia 22201

Raymond B. Benzinger (703) 525-1362
Mary M. Jolma FAX (703) 525-2930

October 6, 1992

Commissioner Charles Dunn
3925 University Drive
Fairfax, Virginia 22030

Re: Sirex USA, Inc. v. Aidant Inc. et al; At Law No. 93228

Dear Commissioner Dunn:

There are enclosed courtesy copies of four Subpoenas Duces Tecum for dual purposes. The Subpoenas order production of certain documents at your office on October 13, 1992, at 1:00 p.m., pursuant to the authority of Virginia Code §8.01-506.1 and further request that the witness appear on October 16, 1992 for a hearing before the Honorable Judge Bach, on exceptions to your report.

We greatly appreciate your services as a Commissioner in this complex and

difficult case. Copies of the Subpoenas are furnished to you herewith in order that you will be completely informed of proceedings in this matter.

Respectfully submitted,

/S/

Raymond B. Benzinger
Attorney for Allen A. Izadpanah

RBBmd
Enclosure
cc: Edward Gross, Esquire

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October 15, 1992

James S. Kurz, Esquire
Kurz, Koch & Doland
Suite 260
1250 24th Street, N.W.
Washington, D.C. 20037

Re: At Law #93228

Dear Mr. Kurz:

I have your letter dated October 12, 1992 in which you inform me that Mr. Crowe will not be obeying the subpoenas. You also state that a motion is set to be heard tomorrow October 16, 1992, to quash the subpoenas. I have not received any notice of such a hearing except through your letter of October 12, i.e., no proper Rule F Notice has been filed or delivered to me. See Form CCR-201-202, paragraph 5. Nor did your "notice" give me the required time within which I might prepare.

To be sure, I checked with the clerk's office and the docket for tomorrow and learned that your "motion" is not on for hearing.

Lastly, I have removed the motion for 30-day stay from tomorrow's motions day docket to the October 30, 1992 docket when Judge Fortkort will be available. The appropriate Praecipe/Notice is enclosed.

If you have any questions concerning the foregoing, please feel free to contact me.

Sincerely,

/S/

Raymond B. Benzinger

Encl.
RBB:mdd

Dunn, McCormack, MacPherson & Maxfield
Attorneys at Law
3925 University Drive
Fairfax, Virginia 22030

Charles C. Dunn
Brian M. McCormack
H.L. MacPherson III
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591-6055
Area Code 703
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591-5151

October 14, 1992

Raymond B. Benzinger, Esq.
Attorney at Law
2009 North 14th Street, #410
Arlington, VA 22201

Re: Sirex v. Aidant - Law No. 93228

Dear Mr. Benzinger:

Thank you for your letter of clarification dated October 13, 1992.

I think it does clarify and take care of all of my concerns. I am assuming that your request in paragraph (9) on page two is directed to counsel and not to me since I have no authority to direct when motions will be heard by the Court.

Again, I do appreciate your letter clearing up my concerns.

Very truly yours,

/S/

Charles C. Dunn

CCD/snt

cc: Edward Gross, Esquire

October13, 1992

Via Facsimile and Mail

Commissioner Charles C. Dunn
Dunn, McCormack, MacPherson & Maxfield
3925 University Drive
Fairfax, Virginia 22030

Dear Commission Dunn:

Apparently our letter of October 6, 1992 with attached subpoenas was not as self explanatory as I had hoped. to the extent my previous letter resulted in a miscommunication with the Commissioner, I regretfully apologize and submit the following clarification.

...

(2) Those subpoenas were in fact served upon Messrs. Gross and Crowe.

...

(7) We expect that the subpoenas will be adhered to as a valid order of the court. We intend to move for a Rule to Show Cause if they are not honored.

Again, Commissioner Dunn, I apologize for any misunderstanding that may have occurred. I was merely following what I thought was permitted by the statute.

Respectfully submitted,

Raymond, B. Benzinger

RBB:md

cc: James Kurz, Esquire
Edward Gross, Esquire

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

AFFIDAVIT

EDDIE CHU, hereby deposes and says:

1. I am the President of Sirex, U.S.A., Inc.

2. Sirex U.S.A. sold goods to AIDANT, INC. under terms which included individual guarantees of payment.

3. Goods were not paid for and collection proceedings were instituted and judgment obtained. (Sirex USA, Inc. AIDANT, Inc., et al. Law # 93228)

4. Partial payment was recovered.

5. The balance of the judgment was subsequently assigned to Federal Computer Corporation for additional consideration on July 29, 1991. See attached.

6. At the time of assignment, less than the full judgment had been paid.

7. The original action was maintained by local council Edward Gross on behalf of Sirex.

8. Subsequent to the assignment, counsel acted on behalf of the assignee of the judgment.

DATED: New York, New York
October 29, 1992

_____
EDDIE CHU

Sworn to before me this
29th day of October, 1992

_____

Notary Public

EXCERPT OF TRANSCRIPT
HEARING BEFORE JUDGE BRUCE F. BACH
MARCH 30, 1993

*****

[Testimony of Mary Jolma]

Q. Did you look in the files to see if there was an accounting in the files?

A. Yes, I did.

Q. And did you not see my June, 1991, letter to Mr. Benzinger setting out an

accounting of monies owed?

A. I did indeed.

*****

THE COURT: I will order that Mr. Benzinger pay Mr. Gross $10,000; and pay Mr. Kurz $7,500.

I will find that Mr. Gross' costs of -- and I find those to be reasonable attorneys fees, and I find that Mr. Gross' costs of quashing the subpoena is $3,000. Mr. Kurz's costs to quashing the subpoena is $1,500; the difference on the related costs of bringing these sanctions motions.

I say that so that the issue is clear. In my opinion, it doesn't make any sense at all to have a sanctions statue. For example, who would ever bring a $250, or $300, or $1,000 sanction if the other side could costs their client ten times that amount, or five times that amount, or even that amount again in additional attorneys fees in order to bring it.

So, I think that this statute contemplates reasonable fees to bring this sanction motion, and we have been here a number of days on it, and we are here again today, all day today in court, and I think that is a reasonable fee.

As far as Mr. Charlton, I think I have stated before my reasons for not including him in the sanctions, but again if there is any appeal, just like I have stated, all the other figures I will say without question that he was as much or more at fault in this than Mr. Benzinger. He just does not fall under this particular sanction statute.

And I have given my reasons previously for the sanction, but in addition to everything else, to me and at

least as important as filing these subpoenas, was what was asked for, and the way it was asked, and the timing of it.

And in my opinion it was done in a way to bring about maximum disruption and trouble to the other side, as opposed to a way that gentlemen, I suppose, could and should work these problems out.

It was as I said in the other hearing extreme hardball, and I thing that is sanctionable; and let me say this again, and I think I said it before, but I am not indicating that I feel that Mr. Benzinger did anything unethical, or even anything -- well, I don't know what in bad faith means, but I think he was as he saw it vigorously representing his client, and that sort of vigorous representation I think is and should be a thing of the past.